BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Petition of Qwest Corporation for Forbearance	)	WC Docket No. 04-223
Pursuant to 47 U.S.C. § 160(c) in the Omaha	)	
Metropolitan Statistical Area	)	

COMMENTS OF ESCHELON, TIME WARNER TELECOM AND CBEYOND IN SUPPORT OF MCLEOD PETITION FOR MODIFICATION

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Eschelon Telecom, Inc. ("Eschelon"), Time Warner Telecom Inc. ("TWTC), and Cbeyond, Inc. ("Cbeyond"), by their attorneys, hereby file comments in support of McLeod USA's ("McLeod") Petition for Modification filed in the above-captioned proceeding.[1]

DISCUSSION

McLeod's petition provides the Commission with an important opportunity to reconsider its *Omaha Order*[2] in light of new facts demonstrating that competition in the Omaha enterprise market is simply not possible in the absence of UNEs. Contrary the FCC's predictions in the *Omaha Order*, Qwest has not provided McLeod or indeed any other competitor considering entry into the Omaha enterprise market wholesale rates low enough to compete. In fact, as shown below, Qwest's "discounted" rates in Omaha are some of the highest that Qwest offers in *any* market. McLeod is not the only carrier affected by the FCC's order. Integra declined to

[1] *See* Petition For Modification of McLeodUSA Telecommunications Services, Inc., WC Dkt. No. 04-223 (filed Jul. 23, 2007) ("*Petition*").

[2] *See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) ("*Omaha Order*").

enter the market post-forbearance.[3] Eschelon chose not to purchase McLeod's assets after McLeod specifically sought out Eschelon as a buyer. In the *Omaha Order*, the FCC eliminated Qwest's obligation to provide unbundled network elements (DS0s, DS1s and DS3s loops and transport) in 9 wire centers in the Omaha MSA and left McLeod and other CLECs to rely on whatever offerings Qwest would make available under its special access tariffs and as "Section 271 UNEs." The Commission reached this conclusion notwithstanding the strong concerns expressed by the Nebraska Public Service Commission and Iowa Utilities Board regarding the lack of wholesale competition in Omaha.[4] It also reached this conclusion notwithstanding the agency's own contemporaneous contrary findings. Indeed, less than a year before the release of the *Omaha Order*, the FCC recognized in the *TRRO* that special access tariffed alternatives did not justify a reduction in the ILEC's UNE obligations because, without UNEs, ILECs would "have substantial incentive to raise prices to levels close to or equal to the associated retail rate, creating a 'price squeeze' and foreclosing competition based on use of the tariffed wholesale input."[5] The FCC concluded that "[i]t would be a hideous irony if the incumbent LECs, simply

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[3] *See* Declaration of Dudley Slater ¶¶ 6-9 attached to Comments of Integra, WC Dkt. No. 06-172 (filed Mar. 5, 2007).

[4] *See* Additional Comments of Iowa Utilities Board, WC Dkt. No. 04-223 at 4 (filed Jan. 13, 2005) ("Without access to wholesale facilities by competitors, developed levels of competition could dissipate…Without the presence of other wholesale facility-based providers or other wholesale alternatives for competitors, the Board is unable to support Qwest's petition for forbearance…"); Letter of Gerald A. Vap, Chairman, Nebraska Public Service Commission, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 04-223 at 2 (filed Sept. 9, 2004) ("[T]he NE PSC has strong concerns regarding Qwest's Petition for Forbearance and we do not endorse its approval. The harmful impact this will have on competition cannot be over emphasized. We believe that granting Qwest's Petition will be a set back for our state and for the competitive local exchange market.").

[5] *Unbundled Access to Network Elements et al.*, Order on Remand, 20 FCC Rcd 2533, ¶ 59 (2005) ("*TRRO*").

by offering a service, the *pricing of which falls largely within their control,* could utterly avoid the structure instituted by Congress to, in the words of the Supreme Court, 'give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property.'" *Id.* (emphasis added).

In reaching its forbearance decision, the FCC acknowledged its recent findings in the *TRRO* regarding the inability of CLECs to rely on tariffed alternatives, but stated its belief that special circumstances in the Omaha market rendered these findings inapplicable. The FCC made the predictive judgment that because of largely *retail mass market* competition from Cox, "Qwest's market incentives will prompt it to make its network available – at competitive rates and terms – for use in conjunction with competitors' own services and facilities." *Omaha Order* ¶ 83. In other words, because of retail, mass market competition from Cox, the FCC predicted that Qwest would be driven to provide tariffed alternatives at rates *lower than is the case in the rest of its markets*.[6]

The FCC granted forbearance in all of these 9 MSA even though it was unsure of the extent to which the portion of Cox's network capable of serving enterprise customers actually "covered" each wire center. In evaluating whether Cox's network coverage was sufficient to warrant forbearance, the FCC alleged that it would "tailor Qwest's relief to specific thresholds of facilities-based competition from Cox." *Omaha Order* ¶ 62. The FCC granted Qwest's petition in those 9 wire centers where "Cox's voice-enabled plant covers at least 75 percent of the end user locations that are accessible from that wire center." *Id.* The FCC then ignored this

[6] The FCC made this prediction despite its acknowledgement that "The record does not reflect any significant alternative sources of wholesale inputs for carriers in this geographic market." *Omaha Order* ¶ 110. As McLeod has indicated, this situation has not changed and Cox has declined to make any wholesale offer to McLeod despite repeated inquiries. *See* Declaration of Pritesh Shah ¶ 6, attached to *Petition*.

threshold in measuring network coverage in the enterprise market and relied on a different coverage percentage which it aggregated across all nine wire centers. In other words, that portion of Cox's network capable of serving enterprise customers might cover all of the enterprise customer locations in a subset of the nine wire enters, but virtually no locations in another subset of the nine wire centers. The FCC predicted that Qwest would make available reasonably priced wholesale offerings to competitive carriers serving the enterprise market largely because Cox had shown a "capacity" and "inclination" to serve the enterprise market in a portion of the MSA.[7]

As McLeod has explained at length, the FCC's predictions have proven incorrect. Qwest has failed to make a reasonably priced wholesale alternative available in Omaha despite Cox's limited presence in the *retail* enterprise market. With respect to DS1 (and DS3 services), after forbearance, Qwest merely offered McLeod its generally available "RCP" plan offering a 22 percent discount off of extremely high month to month rates. This same plan (with a minor variation put in place last year)[8] has been available for years to any carrier willing to abide by its onerous terms and well before the market was deregulated in Omaha. If the market in Omaha

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[7] *See id.* n. 177 ("Contrary to the arguments of some commenters, our decision today is consistent with the Commission's determination in the *Triennial Review Remand Order* not to rely on wholesale offerings in making impairment determinations…. The record in the current proceeding reveals that Qwest in certain parts of the Omaha MSA is subject to significant competition from Cox; Cox already has constructed an extensive competitive network and has captured [redacted] of the residential voice market in the Omaha MSA, and has a demonstrated and growing capacity – and inclination – to compete for enterprise customers.").

[8] Last year, Qwest revised its RCP plan to provide a 22 percent instead of 20 percent discount. However, the new plan now requires that carriers subject more of their services (e.g., interoffice circuits) to the circuit commitment level in order to obtain the discount. *See* Qwest Tariff FCC No. 1 § 7.1.3.B.1. This has the effect of tying up more demand with Qwest and discouraging carriers from self-deploying transport, converting special access transport to UNEs or finding alternative providers of transport.

truly were competitive, Qwest would have been forced to offer a rate *lower* than its RCP plan provides. Such rates should begin to approach CLEC and UNE rates and, in all events should be lower than Qwest's own price cap rates.

Instead, Qwest's "discounted" prices in Omaha, like all markets subject to Phase II pricing flexibility[9] are much higher than Qwest's "discounted" prices in price cap areas, competitive wholesale prices and UNE rates. Indeed, TWTC consistently pays Qwest substantially higher rates for DS1 and DS3s under the RCP plan in Phase II areas such as Omaha than in areas still under price caps.[10] Far from offering lower rates in Omaha, Qwest's "discounted" rates in Omaha (and the rates that it is offering to McLeod) are some of the highest that it offers in any non-rural market.[11] As explained in comments filed in the special access rulemaking proceeding, Qwest's "discounted" DS1 and DS3 prices in Phase II areas are well over 100 percent higher than both competitor's wholesale prices and UNE rates for nearly all loop lengths (channel terminations plus interoffice mileage).[12]

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[9] *See Qwest Petition for Pricing Flexibility for Special Access and Dedicated Transport Service*s, Memorandum Opinion and Order, 17 FCC Rcd 7363 (2002) (granting Qwest Phase II relief in the Omaha MSA for channel terminations and interoffice transport).

[10] The same RCP plan is available in all of Qwest's markets and provides the exact same 22 percent discounts off of month to month tariffed rates in *all* of its markets. In other words, Qwest charges one set of special access prices across all of its price cap markets and another, higher set of prices across all of its Phase II markets. Therefore, customers on the RCP plan in Phase II markets (like Omaha) will pay the same price for a particular element as customers in Phase II markets in other states.

[11] Unlike other cities in Qwest's region which are usually subject to zone 1 special access pricing in their urban centers, only 1 Omaha wire center subject to forbearance is in zone 1. *See Eben Declaration* ¶ 7. Qwest, like other ILECs, charges higher rates in zones 2 and 3 than in zone 1.

[12] *See* Appendix B, attached to Comments of Time Warner Telecom, WC Dkt. No. 05-25 (filed Aug. 8, 2007).

To obtain even these exorbitant prices from Qwest, TWTC was forced to agree to numerous anticompetitive terms and conditions. For example, TWTC must maintain its circuit commitment at 90 percent throughout the Qwest region. This provision prevents carriers from converting their special access facilities to UNEs, as many carriers do on a regular basis.[13] TWTC is able to bear such a condition because it already relies on ILEC special access to serve the vast majority of its off-net locations, an approach that it can sustain when serving larger enterprise customers.[14] As McLeod has indicted, it is unable to operate profitably serving its target customer base while complying with the requirements of the Qwest RCP plan. *See Eben Declaration* ¶¶ 11-12.

Qwest's proposed DS0 loop prices are no better. Under its post-forbearance proposal, Qwest's monthly recurring charges to McLeod for DS0 loops would increase 30 percent over the UNE loop rate. To even obtain these prices, McLeod would have to agree to waive its rights under the Qwest performance assurance plan. In addition, Qwest is proposing to charge an exorbitant nonrecurring $615.79 charge to "condition" a voice grade DS0 loop to provide

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[13] *See* Declaration of Don Eben ¶ 14, attached to Petition ("*Eben Declaration*") ("McLeodUSA cannot accept the RCP and its volume commitment for the additional reason that in areas where Qwest is obligated to offer § 251(c)(3) UNEs, McLeodUSA has a number of existing special access circuits that it plans to convert to UNE circuits.").

[14] TWTC, unlike Eschelon, Cbeyond and McLeod is able to do rely on special access because of its relatively high number of on-net locations (25 percent) compared to other CLECs. TWTC, before its recent merger with Xspedius, served primarily medium and large customer locations. Because some of these customer locations provide many thousands of dollars of revenue per location, TWTC is in some cases able to serve these customers with on-net facilities. The high cost of special access that TWTC must pay is offset to some extent by the profits that it obtains from these on-net locations. Carriers like Eschelon, Cbeyond and McLeod that serve the vast majority of their customer locations with single DS1s, are almost never able to economically deploy their own loops. Therefore, the switch to special access from UNEs would have a substantial impact on their bottom-lines.

broadband. *See id.* Exhibit 3, appendix 4. Such a high charge would likely preclude competitive carriers from providing xDSL services demanded by small or medium business customers.

Finally, the Commission's inexplicable prediction that the obligation of Qwest to provide "just and reasonable" rates under Sections 201 and 202 and 271 would provide protection to competitors has not been borne out.[15] If market pressures in Omaha are at such a low ebb that Qwest is able to get away with only offering McLeod its standard RCP discounts for special access and similarly high DS0 rates, there is no reason to think that any Qwest "271 UNE" rate, even if offered, would be any lower. Under current rules, since Qwest's RCP rates are considered "just and reasonable" by the FCC under Sections 201 and 202, any equivalent "271 UNE" rate would similarly be considered "just and reasonable."[16] Therefore, unless or until the FCC or the states establish reasonable rates for "271 UNEs" separate and apart from standard ILEC tariffed rates, the mere obligation of RBOCs to provide such 271 UNEs is meaningless.

CONCLUSION

For the forgoing reasons, the FCC should grant McLeod's petition and reinstate Qwest's obligation to provide UNEs in the Omaha MSA.

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[15] *See Omaha Order* ¶ 68 ("We believe that in conjunction with the extensive facilities-based competition from Cox (both existing and potential), this competition that relies on Qwest's wholesale inputs – which must be priced at just, reasonable and nondiscriminatory rates and is subject to Qwest's continuing obligations under section 251(c)(4) and section 271(c) – supports our conclusion that section 251(c)(3) unbundling obligations are no longer necessary to ensure that the prices and terms of Qwest's telecommunications offerings are just and reasonable and nondiscriminatory under section 10(a)(1).").

[16] According to the FCC, an RBOC could satisfy the 201/202 "just and reasonable" standard for Section 271 UNEs if the rate is "at or below the rate that the BOC offers similarly situated purchasing carriers under its interstate access tariff [e.g., special access pricing]." *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers et al.*, Memorandum Opinion and Order, 18 FCC Rcd 16978, ¶ 664 (2003).

Respectfully submitted,

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